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Supreme Court of the United States,

OCTOBER TERM, 1909. No. 736.

THOMAS FRANKLIN,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

MOTION FOR ADMISSION OF PLAINTIFF-IN-ERROR TO BAIL PENDING THE DETERMINATION OF WRIT OF ERROR; AND MOTION PAPERS.

S. T. ANSELL,
Counsel for Plaintiff-in-Error,
West Point, N. Y.

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IN THE

Supreme Court of the United States.

No. OCTOBER TERM, 1909.

THOMAS FRANKLIN,
Plaintiff-in-Error,
v.
THE UNITED STATES OF AMERICA,
Defendant-in Error.

Motion for admission of the plaintiff-in-error to bail pending the determination of the writ of error, in compliance with the terms of an order admitting the plaintiff-in-error to bail made in the Court below.

And now comes the above-named plaintiff-in-error, by S. T. Ansell, Esq., his attorney and counsellor herein, and moves the Court for an order admitting the said Thomas Franklin, plaintiff-in-error, to bail pending the determination of the proceedings in error in this Court, in the sum of ten thousand dollars, or such other sum as shall to the Court seem proper, with sufficient sureties, conditioned according to law, and subject to the approval of a District or Circuit Judge of the United States for the Southern District of New York.

S. T. ANSELL,
Attorney and Counsellor for Plaintiff in-error,
West Point, New York.

4

Notice of Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. OCTOBER TERM, 1909.

THOMAS FRANKLIN,
Plaintiff-in Error,
5 against
THE UNITED STATES OF AMERICA,
Defendant in-Error.

The Honorable Attorney General of the United States:

You will please take notice that the plaintiff-in-error in the above-entitled cause will, on the 17th day of January, 1910, at twelve o'clock noon, or as soon thereafter as counsel can be heard, at the
6 court-room of the Supreme Court of the United States, in the Capitol, in the City of Washington, District of Columbia, move the said Supreme Court for an order admitting the said Thomas Franklin, plaintiff-in-error, to bail pending the determination of the proceedings-in-error in said Supreme Court, in the sum of ten thousand dollars, or such other sum as shall to said Court seem proper, with sufficient sureties, conditioned according to law, and subject to the approval of a Circuit or District Judge of the United States for the Southern District of New York.

Said motion will be made and based upon this notice, the annexed affidavits of the above-named plaintiff-in-error and his attorney in the court below, the annexed certified copies of the orders and opinions made and filed in the court below which are hereby made a part thereof, and upon all the records, files, proceedings and papers in this cause.

Jan. 10, 1910.

S. T. ANSELL,
Attorney and Counsellor for
Plaintiff-in Error,
West Point, New York.

10

Affidavit of Plaintiff-in-Error,

IN THE
SUPREME COURT OF THE UNITED STATES.

THOMAS FRANKLIN,
Plaintiff-in-Error,
against
11 THE UNITED STATES OF AMERICA,
Defendant-in-Error.

In the matter of the application of Thomas Franklin, plaintiff-in-error, in the above-entitled cause, for admission to bail by the Supreme Court of the United States pending the determination of the writ of error to said Court sued out by the said plaintiff in-error, made in compliance with the terms of an order made by the Circuit Court of the United States for the Southern District of New
12 York, in the Second Circuit.

THOMAS FRANKLIN, plaintiff-in-error in the above-entitled cause, being duly sworn, deposes and says and respectfully represents unto the Court:

First.—That he is the plaintiff-in-error in the above-entitled cause.

Second.—That he is now enlarged on bail in the sum of ten thousand dollars.

13

Third.—That he stands convicted in the Circuit Court of the United States for the Southern District of New York of

(1). The alleged presenting of fraudulent claims against the government, or a department or officer thereof, in violation of Section 5438, R. S. U. S.

(2). The alleged grand larceny of $819.26 monies of the cadets of the United States Military Academy, which larceny was effected by the payment of the above-mentioned claims, in violation of the Act of July 7th, 1898, Section 2, Chapter 576, 30 Stat. L., 717.

14

Fourth.—That upon conviction, on the 14th day of December, 1909, affiant sued out a writ of error to this Court; and thereupon he was admitted to bail by the trial court aforesaid in the sum of ten thousand dollars ($10,000), conditioned that he should make further application for bail to this Court on the third day of January, 1910.

Fifth.—That upon the said third day of January, 1910, for good cause shown to the court below and without fault or negligence on the part of affiant or his counsel, the trial court extended the time of making said application in the Supreme Court to and including the 17th day of January, 1910, and again admitted affiant to bail in the same sum and under the same condition as aforesaid.

15

Sixth.—That on the 16th day of June, 1909, in the Circuit Court of the United States for the Southern District of New York, aforesaid, an indictment was returned charging, or attempting to charge, affiant with making and presenting to an officer in the military service of the United States,

16 namely, to the Superintendent of the United States Military Academy, at West Point, New York, and to himself as Treasurer of the said Academy, for payment and approval certain false, fraudulent, and fictitious claims upon and against the Government of the United States, or a department or officer thereof, which claims were on an account of the said Thomas Franklin against the cadet mess at the said Academy, and which were alleged to be fraudulent in that they overcharged the said cadets the sum of eight hundred and nineteen dollars and twenty-six cents ($819.26). This indictment, with its several counts, was drawn under Section 5438,
17 Revised Statutes.

On the same day and in the same court another indictment was found charging, or attempting to charge, affiant with the embezzlement of this same sum, viz., $819.26, moneys of the cadets of the Military Academy, which embezzlement was effected through the payment of the false and fraudulent claims aforesaid. This indictment was laid under Section 5497 of the Revised Statutes.

The same embezzlement was also charged, or attempted to be charged, in three counts of another indictment as larceny in violation of Section 5391 Revised Statutes, and in three other counts thereof,
18 as grand larceny in the second degree, as known to and defined by Sections 538 and 531 of the Penal Code of the State of New York, as provided by Section 2, Chapter 576, Act of Congress of July 7th, 1898, 30 Stat. L. 717.

All these indictments, and each and every count thereof, were, so affiant is informed and believes, utterly insufficient to charge any offense against the United States and against this affiant, and to them all and several affiant demurred.

The demurrer to the indictment under Section 5497 was sustained, to which judgment the United

States sued out its writ of error to this Court where the cause is now pending. The argument on the demurrers having developed probable defects in the indictment under Section 5438, on the following day a new indictment under the same section and designed as a curative, was returned against the petitioner, which indictment affiant believes still to be utterly insufficient.

Subsequently, at the trial, the Government entered a *nolle prosequi* to the larceny counts under Section 5391 and consolidated both the old and new indictments under Section 5438 Revised Statutes with the grand larceny counts under the said Act of July 7th, 1898.

On this consolidated indictment charging, or attempting to charge (1) the grand larceny of $819.26, moneys of the cadets of the Military Academy, and (2) presenting for approval or payment fraudulent claims against the Government, or a department, or officer thereof, the cause, on the 14th day of December, 1909, came on for trial and the affiant was convicted.

Before sentence affiant moved in arrest of judgment specifying and urging, among other grounds:

That the allegations in said consolidated indictment constitute no crime known to the laws of the United States;

That the said Act of July 7th, 1898, is unconstitutional and void;

That jurisdiction is denied the said Circuit Court of the United States by the very terms of the Act itself under which the indictment is laid, and is vested in the legally constituted courts-martial of the United States.

These grounds and others were urged in arrest of judgment, yet the motion was nevertheless denied.

The Government then moved for a general sen-

22 tence, and the court held that both the embezzlement and the means whereby it was effected were to be considered, for the purposes of sentence, a single transaction, the maximum confinement for which is, by the statute, a term of five years. Notwithstanding affiant's exceptionally valiant and inestimable services as an officer of the army for twenty years and as treasurer of the Academy for six years, his present penniless circumstances, and the pitiable condition of his helpless family, all of which were urged in his behalf for judicial clemency, affiant was sentenced to serve two and one-
23 half years in the Federal Penitentiary at Atlanta, Georgia.

On the following day, and without delay, petitioner prayed for and obtained a writ of error from this judgment to this Court, which, together with the citation, certificate and assignment of errors, has been served on the United States.

Petitioner also prayed that a supersedeas be granted to stay the sentence and that he be admitted to bail pending the determination of the writ of error in this Court.

The Government, through its attorney for the aforesaid district, opposed the motion, urging that
24 his Honor, Judge Hand, the Trial Judge, had heard and overruled the several demurrers interposed by affiant and had also denied the motion in arrest and, therefore, could entertain no reasonable doubt of the legality of the conviction; and that, in general, admission to bail after conviction was contrary to the policy of the law and to the practice of the Courts both State and Federal in this district.

Seventh.—Nevertheless, the supersedeas staying the execution of the sentence pending the determination of the writ of error was granted as prayed for, and affiant was also admitted to bail in the sum

25

of ten thousand dollars, with sufficient sureties, until such time as affiant could apply to this Court for admission to further bail. January 3d, 1910, later extended to January 17th, 1910, was also fixed by the trial court as the time for filing the application, as per orders and opinion of his Honor, Judge Hand, hereby made a part of this application.

In view of the dispatch with which the appellate papers were prepared and served there was not nor could there be any question as to the honesty of affiant's motive in availing himself of his legal right to proceed to the Court of last resort and without delay.

Eighth.—The Government in the court below 26
did not question, but on the contrary the United States Attorney distinctly and frankly admitted, that bail would secure the reappearance of affiant at the determination of the proceedings in error; the said attorney asserted to the court that he entertained no doubt but that affiant would present himself to serve his punishment should the decision of this court be adverse to his contention; that so far as the matter of appearance was concerned one amount was as good as another for security therefor; and that a parole in the custody of his counsel would, in his opinion, be equally 27
effective, as he did not question that petitioner would appear to answer any mandate of this Court.

Ninth.—Affiant further deposes and shows the Honorable Court that bail before conviction was fixed in the sum of four thousand dollars.

Tenth.—That he is an officer of the regular army and a captain in the subsistence department thereof; that he is now, and has been since indictment,

28 carried on the rolls of the army as "absent in the hands of the civil authorities," by virtue whereof, under a rule of military administration, his pay and allowances as an officer of the army were "stopped," or suspended, when the indictments were found; that he has received no pay or allowances since that time, nor can he do so until and unless this Court shall, as he belives it will, reverse the judgment of the lower court.

Eleventh. That he is at present, and must so remain for a considerable time to come, in destitute
29 circumstances, unable even to compensate counsel for his services; and that he has to rely on the friends he still retains to furnish bail, which they have hitherto done and, as he is informed and believes, they stand ready now to do in any reasonable amount fixed by this Court or other proper authority.

Twelfth. That he has no regular means of livelihood other than his profession, which is now denied him, and has dependent upon him for their support a wife and four children, two of whom are mere infants; that wife and youngest child, a six weeks' baby, are now seriously sick; and that if re-
30 leased on bail now, he has an offer of employment sufficiently remunerative to sustain his family until a final decision by this Court, but that said offer can remain open but little longer.

Confinement during the pendency of the proceedings in error would simply be punishment in the guise of custody, a punishment and a hardship for which, in his case, there can be no subsequent legal redress and which, as a matter of custody, the Government admitted in the court below to be wholly unnecessary.

THOMAS FRANKLIN.

31

WEST POINT, NEW YORK,
In the Southern District,
In the Second Circuit.

Personally appeared before me the undersigned authority, a United States Commissioner for the District aforesaid, Thomas Franklin, who is known to me, and who being duly sworn, on oath deposes and says that he is the above-named petitioner in the above-entitled cause which is now pending in the Supreme Court of the United States; that all the matters and facts stated in the above affidavit to be true, and that all matters stated on information and belief are true to the best of his knowledge, information and belief. 32

THOMAS FRANKLIN.

Subscribed and sworn to before me
this 7th day of January, 1910.

E. T. MCENANY,
United States Commissioner.

Seal of said
Commissioner.

33

34

Additional Affidavit of Plaintiff in Error.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Personally appeared before me the undersigned authority, Thomas Franklin, who, being duly sworn, deposes and says:

First.—That an investigation of the present charges was begun more than fifteen months ago;
35 that he was at all times both personally and officially aware of the same, and that during all that time he has remained at liberty.

Second.—That even while the Grand Jury were investigating said charges he knew of the same, and had every opportunity to escape had he so desired, but remained to answer if called for.

Third.—That upon being indicted he appeared in court in response to a notification from his counsel, and was arraigned and gave bail; no warrant was ever issued and no other effort to restrain him ever
36 made.

THOMAS FRANKLIN.

Sworn to and subscribed before me this the 10th day of January, 1910.

E. T. MCENANY,
United States Commissioner.

Seal of said Commissioner

37

WEST POINT, NEW YORK.
In the Southern District of New York,
In the Second Circuit.

Personally appeared before me the undersigned authority, a United States Commissioner for the District aforesaid, S. T. Ansell, who is personally known to me, and who, being duly sworn, on oath deposes and says: That he is an attorney at law of the Court of Appeals of the District of Columbia, the same being a Court of record, and an attorney and counsellor of the Supreme Court of the United States; that he was attorney for the plaintiff-in-error when this cause was in the Court below, and that he is his attorney and counsellor 38
herein; that he has read the above affidavit of the said Thomas Franklin, and has examined and is conversant with the proceedings mentioned herein, because whereof, and by his own personal knowl edge and diligent inquiry as to the matters set forth therein, he believes them all to be true.

S. T. ANSELL.

Subscribed and sworn to before me
this 7th day of January, 1910.

E. T. MCENANY,
United States Commissioner. 39

Seal of said
Commissioner.

40

Order Granting Writ of Error and Supersedeas.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA

v.

THOMAS FRANKLIN.

41

It appearing to the Court that an assignment of errors having been filed according to law and the rules of the Court in the above-entitled cause, and a writ of error to the Supreme Court of the United States having been prayed for, it is

Ordered, that the writ of error be granted; and it is further

Ordered, that when a writ of error is sued out the execution of the sentence be suspended pending such writ of error.

42 Dated this 14th day of December, 1909.

(Signed) LEARNED HAND,
Judge District Court.

43

Order of Admission to Bail.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA,

v.

THOMAS FRANKLIN.

44

It appearing to the Court that a writ of error to the Supreme Court of the United States has been sued out and execution of the sentence suspended in the above cause.

Now, on motion of S. T. Ansell, Esq., attorney for defendant, that the said defendant be admitted to bail pending determination of the said writ of error, it is

Ordered, that said defendant, Thomas Franklin, be admitted to bail pending the determination of an application to be made by the said defendant on January 3d, 1910, by the Supreme Court of the 45
United States to be admitted to bail, pending the determination of the said writ of error by the said Supreme Court, upon giving security in the sum of Ten Thousand Dollars ($10,000), conditioned that if the said Thomas Franklin shall apply on said 3d day of January, 1910, to the United States Supreme Court for admission to bail, and within twenty-four hours after a decision by said Supreme Court on said application, or at such other time or times as the said United States Circuit Court may order, shall personally appear and surrender himself into

46 the custody of the United States Marshal, Southern District of New York, then said recognizance to be void, otherwise to remain in full force and effect.

Dated at New York, this 14th day of December, 1909.

LEARNED HAND,
Judge District Court.

Order Extending Time for Defendant to Apply to the Supreme Court of the United States for Admission to Bail.

47

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

48 THOMAS FRANKLIN.

An order having heretofore, on the 14th day of December, 1909, been duly made and entered herein admitting the defendant to bail pending the determination of an application to be made by him on January 3, 1910, to the Supreme Court of the United States, to be admitted to bail pending the determination of his writ of error by the said Supreme Court upon giving security in the sum of ten thousand dollars ($10,000), and it appearing to

this Court that it is impossible for the defendant to make his said application to the Supreme Court of the United States before the 17th day of January, 1910.

Now, therefore, on motion of S. T. Ansell, Esq., attorney for the defendant, it is

Ordered that the time for the defendant to make his application to the Supreme Court of the United States to be admitted to bail pending the determination of his writ of error by the Supreme Court, be, and it hereby is, extended to, and including the 17th day of January, 1910; and it is further

Ordered, that pending the determination of the said application to be made by the said defendant on the 7th day of January, 1910, the defendant be admitted to bail upon giving the same security and upon the same conditions as contained in the order heretofore entered herein on the said 14th day of December, 1909; and it is further

Ordered, that upon the defendant's giving security in the said sum, and upon the said conditions, his present bail be, and they hereby are, exonerated and discharged from all liability thereunder.

Dated New York, January 3, 1910.

LEARNED HAND,
District Judge.

52

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the matter of the application of Thomas Franklin for admission to bail pending the proceedings in error in the Supreme Court of the United States.

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, do hereby certify the
53 foregoing and annexed papers to be true copies of the supersedeas and of the orders admitting Thomas Franklin to bail during the pendency of his writ of error and until he should make application for further bail to the Supreme Court of the United States; and I do further certify that the said supersedeas and orders, copies of which are hereto annexed, are on file in this Court in the above-entitled matter.

Attest my hand and seal of said Circuit Court, this the 8th day of January, 1910.

JOHN A. SHIELDS,

Seal of said Circuit Court.

Clerk of said Circuit Court of the United States for the Southern District of New York.

54

55

Opinion.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

THOMAS FRANKLIN.

56

This is an application on the part of the defendant to be enlarged on bail pending an appeal to the Supreme Court from a judgment of conviction under certain indictments filed in this court. These indictments were consolidated into one and to this consolidated indictment the defendant has pleaded guilty. Two of the indictments were under Section 5438 of the Revised Statutes and the third was under the Act of July 7th, 1898, 30 Statutes at Large, 717. The substance of the offense under the Act of July 7th, 1898, was that the defendant embezzled certain moneys in the West Point Reservation while an officer in the Army; and under Section 5438 the offenses were that to effect the embezzlement of these moneys he presented to an officer of the United States for approval certain claims against a department of the United States. The appeal to the Supreme Court is to be based upon the theory that the Act of July 7th, 1898, under which the third indictment is drawn is unconstitutional, and also the Circuit Court has no jurisdiction. The Act of July 7th, 1898, provides that the laws in force in the several States on July 7th, 1898, shall have the force of law within the respective reservations situated in such States.

57

58 After the defendant pleaded guilty, but before sentence was pronounced, he moved in arrest of judgment, which motion was denied. This application comes up at the time of allowing a writ of error, and concerns, first, the question of whether a supersedeas shall be granted, and second, whether, if it is, the defendant shall be bailed.

HENRY A. WISE, for the United States.
Captain S. T. ANSELL, for the Defendant.

HAND, District Judge: The application for bail
59 must be resolved into two questions, first, whether the execution of sentence should be stayed, and second, whether, if it be stayed, the defendant should be enlarged upon bail. If the Court has any discretion as to the stay of execution very different considerations should govern that discretion from those which should govern the question of bail after stay of sentence, because, if the defendant has the right as of course to a supersedeas, the only proper consideration upon the question of his bail is whether in view of the length of the punishment imposed and the circumstances of the defendant his presence will be insured if he be admitted to bail. In other words, the same consider-
60 ations must obtain after conviction as before, except in so far as the added certainty of punishment justifies the imposition of a heavier bail. In giving bail I have proceeded upon the assumption that the supersedeas was of course, and that the sole question was whether the bail fixed was enough to secure the attendance of the defendant.

On the other hand, had I before me as matter of discretion the question of whether I would stay execution upon this judgment, I should not hesitate to deny the defendant the right to any stay, because I do not deem the point taken in the motion in

61

arrest of judgment as being in serious doubt. My disposition of the case therefore is upon the assumption that, so far as the supersedeas is concerned, I have no discretion, but must allow it, and that the defendant is entitled thereafter upon the question of bail to a decision simply as to what security is necessary to insure his presence, just exactly as before conviction.

Therefore the question in doubt is simply as to whether a grant of a supersedeas is of right, or in discretion. Section 1007 of the Revised Statutes provides that if a writ of error be taken out within sixty days supersedeas follows upon the giving of security. In *Re* Claasen, 140 United States, 200, at 62
page 208 the Supreme Court says that since under this section in criminal cases no security was required the writ of error served itself as a supersedeas "provided the Justice who signs the citation directs that the writ shall operate as a supersedeas." From this decision it is somewhat ambiguous, whether the direction referred to passes of course, or in the discretion of the Judge. On page 209 of that opinion the Supreme Court uses the following words:

"The order made hereon in the present case will allow the Circuit Court, or any justice or judge thereof, in its or his discretion, to admit the defend- 63
ant to bail, after the service of the citation, in such amount as may be fixed."

I understand these words to refer to the question of bail following the supersedeas and the discretion referred to I understand to mean the discretion to fix the amount of bail; and indeed, the discretion to admit the defendant to any bail whatever, in case his cirircumstances be such as to leave the Court in doubt whether bail will insure his presence.

64

In Hudson *v.* Parker, 156 United States, at page 285, Mr. Justice Gray uses the following language:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the Court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

From these words it can only be inferred that the direction in the citation that the writ of error act as supersedeas is of course and not within the dis-
65 cretion of the judge, and further that his discretion is concerned simply with fixing the amount of bail in such a sum as will insure the defendant's appearance. It may have been that this language was not essential to the decision, but I cannot feel at liberty to disregard it, coming from the source from which it comes and being at least opposite to the discussion of the facts then before the Court.

In McKnight *v.* United States, 113 Federal Reporter, 451, the Circuit Court of Appeals for the Sixth Circuit, on page 453, the Court uses the following words:

"The granting of the writ of error in itself stays
66 the execution of the sentence of the Trial Court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedins in error. If this can, or will, be done by requiring bail, there is no excuse for refusing or denying such relief."

This language seems to conflict with the practice laid down in *Re* Claasen, *supra*, in so far as it does not require any indorsement upon the citation, but it corroborates that interpretation of the language in *Re* Claasen, which makes, of course, the grant-

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ing of a supersedeas, and I have felt bound by the case, especially as two of the judges in that court are now justices of the Supreme Court.

In addition it should be noted that the words used in Rule 36 of the Supreme Court are as follows:

"He may also grant a supersedeas and stay of execution or of proceedings."

Now it is my understanding that the word "may" when used, at least in a statute, will be construed as "must" whenever the power conferred is "for the sake of justice," by which I understand no more than that the power is given in the administration of justice. The earliest case 68
which I can find of this construction of "may" as "must" is Rex *v.* Barlow, 2 Salkeld, 609 (1693), which has been cited scores of times. Singularly enough, that case, which is apparently the origin of the rule, refers to a still earlier case, not reported, in which the power to take bail is construed as mandatory when given to a sheriff by the word "may." The language used is as follows:

"Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'; thus 23 Henry VI says the sheriff may take bail; this is construed he shall; for he is compellable to do so." 69

This case has been consistently followed to the present time, though the precise words "for the sake of justice" are not always used; though, see Mitchell *v.* Duncan, 7 Florida, 13, 21. In Mason *v.* Ferson, 9 Howard, 246, 259, the Court uses language equally covering this case as follows:

"Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer,

70 and relates to the public or third parties." Again, "What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do." All this language was essential to the decision

In Supervisors *v.* United States, 4 Wallace, 435, 447, Mr. Justice Swayne says:

"What they (public officers) are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right; and to prevent a failure
71 of justice."

In People *ex rel.* Bank *v.* Supervisors, 51 New York, 401, the same rule enforced and a number of authorities cited. In People *ex rel.* Conway *v.* Supervisors, 68 New York, 114, 119, the Court says: "Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'must.'"

Dwarris on Statutes, page 604 lays down the same rule, and I think that where there is an ambiguity, the doubt must be resolved in favor of the statute's being mandatory. A rule of an Appellate Court should be subject to the same construction.

72 In opposition it has been urged that bail was refused to Charles W. Morse by the Circuit Court of Appeals for this circuit in a decision without opinion not reported, but handed down last June. I do not regard this decision as in point, because it may well have turned upon the question, whether under the circumstances any bail could be fixed sufficient to insure his appearance. Eventually, the Court did grant bail, but in an unusual form obviously designed to exert a special compulsion upon him to appear. There is no evidence that upon the first consideration any other question was before the Court than the likelihood of bails insuring

his appearance. There is also an unreported opinion of Judge Hough in this district declining to allow bail in the case of United States *v.* Kavanaugh, which indicates that in his judgment the determining question was the probability of error in the conviction, and that he did not regard the question as being one simply of the certainty of the defendant's reappearance, but he says that the question is one of doubt, and it is quite possible to read the decision as meaning no more than that under the circumstances Kavanaugh might abscond and forfeit his bail. 73

Therefore, I feel obliged to endorse upon the citation that the writ of error shall act as a supersedeas, and the question becomes simply whether bail should be taken. I have little doubt that a bail of ten thousand dollars ($10,000) will insure his appearance in case of an affirmance of the conviction, and it seems to me that the defendant in that case has the right to have bail fixed. As, however, the question of the custody of the defendant, pending the proceedings in error, seems under McKnight *v.* United States (*supra*) to be more properly for the Appellate Court, I shall make his bail returnable at the end of such time as will enable him to apply to the Supreme Court for bail. This will give him an opportunity to be released from custody until that Court determines upon his custody, they having jurisdiction after the writ of error is allowed. There is considerable difference of opinion about the questions involved, and it would be of the greatest value, should the highest tribunal feel that the occasion justifies an authoritative declaration upon the subject. 74 75

LEARNED HAND,
D. J.

76

UNITED STATES OF AMERICA, }
Southern District of New York. } ss

Personally appeared before me the undersigned authority, S. T. ANSELL, who, being duly sworn, deposes and says: That the foregoing paper is a copy of the opinion filed by His Honor, Judge Hand, in the matter of the motion that the said Thomas Franklin be admitted to bail, which copy was furnished him, the said affiant, as counsel for the said Thomas Franklin.

S. T. ANSELL.

77 Subscribed and sworn to before me }
this 8th day of January, 1910. }

JOHN A. SHIELDS,
U. S. Commissioner,
S. D. of N. Y.

Seal of said }
Commissioner. }

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